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Supreme Court, U.S.
FILED
081166 FEB 26 2009
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT PAUL MADDEN,

Petitioner,

vs.

STATE OF ARIZONA

Respondent.

On Petition for Writ of Certiorari
to the Arizona Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is constitutional under the Due Process Clause of the 5th and 14th Amendments for a state to allow a jury to convict a Defendant when the trial judge gives NO INSTRUCTION WHATSOEVER to the jury defining an ESSENTIAL ELEMENT (mental state) of the crime under state law, especially when other state statutes do SPECIFICALLY define that element and the definition is specific and restrictive?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Robert Paul Madden, by and through undersigned counsel, respectfully petitions for a writ of certiorari to review the decision of Arizona Court of Appeals in this case.

OPINIONS BELOW

Neither the Arizona Court of Appeals memorandum decision nor the Arizona Supreme Court minute entry denying Review are reported anywhere, except possibly on the internet site of the Court of Appeals. The Appendix contains the slip opinion of the Court of Appeals, which is the subject of this Writ, and the one-page minute entry of the Arizona Supreme Court denying Discretionary Review.

JURISDICTION

The date of denial of discretionary review was December 3, 2008. No rehearing of such is permitted in Arizona. Jurisdiction to review by certiorari the decision of a State's highest court is conferred by 28 U.S.C. Sec. 1257(a).

STATUTORY PROVISIONS INVOLVED

From the standpoint of federal review, only the 5th and Section 1 of the 14th Amendments to the U.S. Constitution are relevant. The 5th Amendment provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the 14th Amendment provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

> process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant state statutes necessary to decide this Writ are only Arizona Revised Statutes § 13-2904 (A)(6) which reads as follows:

> A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person: Recklessly handles, displays or discharges a deadly weapon or dangerous instrument;

under which petitioner Mr. Madden was convicted; and Arizona Revised Statutes § 13-105 (9)(c) which reads as follows:

> 'Culpable mental state' means intentionally, knowingly, recklessly or with criminal negligence as those terms are thusly defined: ...(c) 'Recklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person

> would observe in the situation. A person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk;

this statute defines the mental state of recklessness under Arizona law. It was THAT statute and the mental state defined by it—an essential element of the statute under which Mr. Madden was convicted—that was NOT mentioned or instructed on by the trial court before the case went to the jury.

STATEMENT

Although petitioner will summarize the issues herein, we respectfully request that the Court read the entire, concise Petition For Review (to the Arizona Supreme Court) in the Appendix to understand why this unusual Writ should be granted.

This was a case where Mr. Madden, an elderly veteran with no prior criminal record, was subjectively—even if not objectively- scared by the actions of a stranger who drove into his trailer park, blaring loud music, and who did not explain his presence or promptly leave. Although unnecessary in hindsight (only), Mr. Madden felt it prudent to bring out his rifle from his trailer for POSSIBLE self-defense use. Under everyone's version except the alleged victim, Jesse Mejia, the gun was kept stationary at Mr. Madden's side throughout the incident, never

brandished about or aimed at Jesse. Jesse only claimed that Mr. Madden briefly aimed the gun at his head and told him he would be shot if he ever came back. But even Jesse never claimed the gun was ever otherwise moved or brandished about recklessly.

Mr. Madden was not arrested at the scene but was later indicted for Aggravated Assault on an Indictment (see Appendix) alleging that he intentionally put Jesse in fear of imminent death or injury. No recklessness allegations were made. As explained in the Petition for Review, BOTH sides at the ensuing trial tried the case from beginning to end as an all-or-nothing intentional Aggravated Assault. Both sides in opening arguments and in ensuing witness questioning—treated the case as if the SOLE issue/question was whether or not Mr. Madden had AIMED the gun at Jesse's head. Only after ALL testimony was in and instructions/verdict forms were being settled did the included offense of which Mr. Madden was finally convicted—A.R.S. § 13-2904 (A)(6)—come up.

As stated well in the Petition for Review, the Prosecutor suddenly asked for a verdict form and instruction on the lesser-included offense of disturbing the peace recklessly with a gun, the A.R.S. § 13-2904 statute. This was done for one of two reasons apparently: (a) on the record, the prosecutor acted as if it was benevolent paternalism so the jury could return a lesser verdict with a lesser sentence; (b) in reality, in the opinion of Petitioner herein, the

Prosecutor knew from the excellent defense presented that he probably could not get a conviction on the charged offense of Aggravated Assault based on the claim the gun was aimed at Jesse's head and wanted to get some felony conviction with a mandatory prison sentence.

In any event, Mr. Madden and his trial attorney vigorously objected six times to the lesser-included offense being submitted to the jury. Although at one point the trial judge implied it was Mr. Madden's decision whether the 13-2904 charge would be submitted, the trial judge suddenly ordered it submitted without explanation or opportunity for further argument. Catching trial counsel by total surprise, trial counsel had never even heard of the obscure statute in question and thus had no Instructions prepared to deal with it. This was sandbagging of the first order. Indeed, the surprise was so startling that trial defense counsel never mentioned the 13-2904 charge in his closing argument, but discussed only the original Aggravated Assault (gun aimed at head) charge on which the ENTIRE trial had been based. However, as discussed in the Petition for Review, the Prosecutor emphasized the 13-2904 charge ONLY in his FINAL closing to which defense counsel of course gets no rebuttal in a criminal case.
The key ERROR—which Petitioner herein now claims was of Constitutional Due Process magnitude—occurred right after the proceedings discussed above when the trial judge Instructed the jury. Although the

judge properly listed all the elements of the A.R.S. § 13-2904 crime, he gave NO DEFINITION WHATSOEVER of the required "recklessness" (mental state) element of that offense. This error was compounded into CLEAR, FUNDAMENTAL ERROR when the prosecutor, as stated in our Petition for Review, misstated both the law and the facts about what was required for a conviction under the 13-2904 statute. The jury came back with a guilty verdict on the 13-2904 charge of disturbing the peace recklessly with a gun, a mandatory-sentence felony. The jury implicitly acquitted Mr. Madden of the original Aggravated Assault charge by its sole verdict on the lesser-included offense.

After motions for a directed Judgment of Acquittal N.O.V. and for a new trial were made and denied, Defendant was sentenced to prison as required by law. An appeal was filed by defense counsel and denied in the outrageous non-published memorandum opinion by the Arizona Court of Appeals attached in the Appendix. The Petition for Review attached in the Appendix was then filed and not responded to by the State in any form. But after several months, a panel of the Arizona Supreme Court denied review without giving reasons. This Petition for a Writ of Certiorari then followed. Because it seemed OBVIOUS that FUNDAMENTAL ERROR from a state-law standpoint had been committed by the Judge failing sua sponte to instruct on the Recklessness (mens rea) element and statutory definition, no mention of a federal question

was thought to be necessary. But in the Petition for Review to the Arizona Supreme Court on P.10, Madden did cite *U.S. v. Wolfson,* 573 F.2d 216, 220 (5th Cir. 1978), stating that "...failure to instruct on the law relating to the facts of the case and matters vital to the rights of the defendant constitutes FUNDAMENTAL ERROR" although no specific reference to the 14th Amendment was made. Petitioner thus believes that the federal question WAS properly raised below, especially in light of the fact that at the time, no Federal-Law Intervention was thought necessary. Since the Arizona Supreme Court issued no opinion in denying Review, there was no Ruling on the Federal Question thus raised. The Arizona Court of Appeals only discussed (and incredibly mis-applied) state law in its written decision. Nevertheless, because the proceedings below DID deny Due Process, this Honorable Court has discretion to grant this Writ if it sees fit to do so.

REASONS FOR GRANTING THE PETITION

It is understood that this Court rarely grants a writ MERELY to correct mis-application of settled law. But it appears—much to the shock of Petitioner/Defendant and his counsel—that maybe the law on this matter is NOT settled. Although almost every federal decision—from this Court and otherwise—assumes that there is a Fundamental Due

Process right to have a jury decide a case on the basis of the Actual Law—and not their own opinion of the "proper" law from television or a dictionary—this Court may not have ever had occasion to SO STATE AND ORDER. Probably because before this, NO state appellate court HAS EVER issued such a frivolous decision as herein wherein it virtually INVITED the jury to speculate on the meaning of an essential element (mental state) of the crime from television or a dictionary. Until THIS case, this Court has never found it NECESSARY to demean a state appellate court by reminding them of this basic principle of Due Process under the American system of criminal jurisprudence. THIS case gives the Court an opportunity to "send them a message" as the late Governor George Wallace proclaimed in his 1968 Presidential campaign.

Your Rules 10 (b) and (c) provide grounds for granting the Writ in this unusual case. Under (b), the state's highest court in Arizona—by permitting the Court of Appeals decision to stand—has INDEED "decided an important federal question in a way that conflicts with another state court of last resort or of a United States court of appeals; "AND/OR under (c), a state court...has decided an important question of federal law that has not been, but should be, settled by this Court..." Numerous federal and state cases could be cited herein, but based on the "concise argument" and "brevity" portions of your rules, a few federal cases

will suffice to make the point. If the Writ is granted, more extensive briefing will follow of course.

The *Wolfson* case, supra, is instructive because like almost ALL other state and federal cases (except *State v. Madden*!!!) it ASSUMES that of course the Judge must instruct on all relevant principles of law related to a criminal trial. But it goes FURTHER (and this Court does not have to go that far to reverse Madden) and says that a Defendant is entitled to jury instructions "...which precisely and specifically, rather than merely generally or abstractly, point to the theory of his defense...When the evidence does not clearly relate to the instructions, we cannot depend on defense counsel's closing argument to save the Judge from error." (Emphasis supplied) (at P. 221 of 573 F.2d, citing many cases). The *Wolfson* court MOST CERTAINLY would not adopt the nonsense in the Arizona Court of Appeals memo decision that the elements of the crime are so obvious and common-sense that Instructions need not be given. That was sort of the Government's argument in *Wolfson*—that the instructions that were given about how to value yachts for tax purposes were sufficient to properly show the jury what it had to find to convict. Remember in *Wolfson*—UNLIKE HERE—SOME instruction defining the issue in question (how to determine what valuation is fraudulent for tax purposes) WAS given. But the Court said it wasn't clear enough to guide the jury in a "close case". Of course, the Arizona Court of Appeals somehow never

realized that the *Madden* trial WAS a "close case" on the issue of recklessness; again the Wolfson court would not agree. In *Wolfson*, the 5th Circuit said that "...we do not believe that [a] single sentence, using the legal jargon of 'forced or distress', set in the midst of largely irrelevant instructions, was sufficient." (at P. 220).

In *Wolfson*, the Court emphasized the essential role of the TRIAL JUDGE—as opposed to arguments of counsel—in setting forth proper Instructions. (Remember here, the Prosecutor's argument compounded –not mitigated—the Judge's error). The Court said at P. 220: "The Judge failed to meet his obligations for providing precise instructions on the factual issues in controversy." It added: "The primary purpose of jury instructions is to DEFINE with substantial particularity the factual issues, and to clearly instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them." (Emphasis supplied). Further, the *Wolfson* court made clear it doesn't "buy" the harmless-error theory that the Arizona court may have relied on here. (Please see headnote 5 on P. 221). Part of the reason the Court found REVERSIBLE error was found on P. 220 where the Court pointed out, very relevant hereto, "'the closeness of the issue ...imposed an obligation on the trial court judge to instruct the jury with extreme precision...'" In this case, the ONLY MAJOR issue on the 13-2904 charge on which Mr. Madden was

convicted WAS the RECKLESSNESS (mental state) issue which the judge failed to instruct on. Thus, there is NO WAY such omission could be harmless error HERE—although the Arizona Court of Appeals never found ANY error and thus, didn't really apply harmless error analysis.

Even more relevant is a federal case from Arizona, cited in the original appellate briefs but never commented on by the Arizona Court of Appeals. It is *U.S. v. Paul*, 37 F.3d 496 (9th Cir. 1994). It is even more in point because unlike *Wolfson*, Paul involved a STATE OF MIND ISSUE like the one herein; indeed the issue of RECKLESSNESS was one of the matters in issue there in determining if proper instructions were given on the elements required for voluntary and involuntary manslaughter vs. 2nd degree murder. Paul is important for Writ purposes because it provides the reason why there IS a federal question HEREIN. The 9th Circuit said it was PLAIN ERROR, derogating the fundamental rights of a criminal defendant, to give the Instructions given EVEN IF there is no proper objection at trial and EVEN THOUGH the Instructions given were the Ninth Circuit Model Jury Instructions!!! At P. 500 of 37 F.3d, the Court said this was because "...those instructions fail to distinguish the different mental state requirements of voluntary and involuntary manslaughter." Although the Court did not say flatly that the 14th Amendment was involved, [because it was a federal criminal case decided under Federal

Rule 52(b)] the discussion at headnotes 5,6,7, and 10 at P. 500 clearly indicate that the error affected "...'substantial rights', which typically means that the error must be prejudicial," and reversal was absolutely necessary "...because we believe a miscarriage of justice would otherwise result." That kind of language clearly implicates the Due Process Clause of the 14th Amendment under principles which need no citation here.

The *Paul* court said (at P. 500) that Plain Error was committed because "The district court's failure to instruct the jury on the different mental state requirements of voluntary and involuntary manslaughter (occurred despite the fact that)...it was clear and obvious under the case law that such an instruction was required." As we pointed out in the attached Petition for Review in the Madden case, the Paul court pointed out (at P. 500) that the defective instructions allowed the Defendant there to be convicted WITHOUT PROOF that he "acted recklessly with extreme disregard for human life." In Madden, as stated repeatedly, the jury was NEVER informed of the BIG difference in Arizona law, in light of A.R.S. § 13-105 (9)(c), between the simple negligence which Mr. Madden MIGHT be guilty of and the statutory requirement of "gross deviation" (recklessness) of which there was NO evidence of in the Madden case.

Just days before filing this Petition, the issue came up again in the Apache County, Arizona Juvenile Court. In a nationally publicized case where an 8 year

old boy allegedly murdered his father and another man, a plea to negligent homicide was accepted by the Juvenile Judge. That statue is also based on a recklessness component like the one in Madden. For the factual basis, the boy answered "yes" to the following question from Judge Michael Roca: "Did you...do something REALLY DANGEROUS OR RISKY (emphasis ours) and, as a result, did someone die?" Again, our point is that ORDINARY negligence is almost NEVER grounds for criminal convictions in Arizona or the whole U.S.; the State must prove RECKLESS conduct—a much higher standard as provided by A.R.S. § 13-105 (9) (c). (Please see our Supplemental Filing of authorities with the Arizona Supreme Court in the appendix for a local animal cruelty case where that was also the decisive issue.)

In addition, there are several other federal cases that make the point that a State Judge MUST instruct on all required elements of the offense, in order to insure that the jury does not convict unless there is evidence beyond a reasonable doubt on all elements of the crime charged. The cases indicate such is a requirement of Due Process imposed on the States by the 14th Amendment.

For example, two other 9th Circuit cases made it clear that it violates due process and is "constitutional error" for a judge to withdraw one of the elements of the crime from decision by the jury—either DIRECTLY by determining an element himself as in *U.S. v. Gaudin*, 997 F.2d 1267 (1993)—or

INDIRECTLY as in OUR case and *Martinez v. Borg*, 937 F.2d 422, 423 (1991), where an element of the crime charged was omitted from the jury instructions. Those cases declared such to be "plain error" which makes it immaterial whether defense counsel seasonably raised it at trial.

Those cases were based on this Honorable Court's rulings in prior cases, including *Carella v. California*, 491 U.S. 263, 109 S. Ct. 2419 (1989). All these cases make it clear that the giving of proper instructions on OTHER elements of the crime cannot insulate the case from reversal if a proper instruction is NOT given on some required elements of the crime. That is precisely the situation in Madden here!

Another relevant Supreme Court case is *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1983). It cited In re *Winship*, 397 U.S. at 364, 90 S.Ct. at 1073. Although *Winship* was primarily a case to determine if juveniles—like adults—must be found guilty "beyond a reasonable doubt" like adult criminal defendants (NY had permitted a preponderance standard), it also held that the Due Process clause of the 14th Amendment "...protects the accused against conviction except upon proof beyond a reasonable doubt of EVERY FACT necessary to constitute the crime with which he is charged." (Emphasis ours). Although *Winship* did not involve a jury or jury instructions, *Francis* applied the *Winship* principle to a jury trial. In *Francis*, the error was not one of an omitted instruction like here but rather of a similar fatal defect in instructions.

Namely, the giving of an instruction which told the jury it had to presume certain necessary elements of the crime. So while *Francis* is not squarely in point with *Madden* (one of the reasons this Court should hear *Madden*), the principle of Due Process it establishes, is virtually IDENTICAL to that we claim must apply here in Madden.

Carella v. California, supra, said flatly that "The Due Process Clause of the 14th Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt EVERY ELEMENT of the charged offense." (Emphasis ours). This Court pointed out in the majority opinion that instructions not so requiring "...subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases§." (Emphasis ours). *Carella* was another "presumption" instruction situation. At P. 270 of the U.S. citation, Justice Scalia's concurrence makes the DECISIVE point that when improper instructions are given on any element, it is usually impossible to determine (contra the Ariz. Ct. of Appeals decision here, for example) that there is sufficient evidence anyway to justify a valid conviction under the Due Process clause.

The case of *U.S. v. Serawop*, 410 F.3d 656 (2005), is also very relevant. It said at headnote 6, P. 667:

> It is undisputed that failure to instruct the jury on an element of the offense is error. *United*

> *States v. Riggans*, 254 F.3d 1200, 1202 (10th Cir. 2001); see also 2A Wright, supra, § 487, at 392 ('**It is grave error to submit a case to a jury without accurately defining the offense charged and its elements.**'); id. § 497.1, at 472-73 ('If intent is an element of the crime, whether or not it is stated as an element, it is plain error for the court to fail to charge on that element.'). (Emphasis ours).

One more 5th Circuit case is relevant to the decision on granting this Writ. See *Sears v. U.S.*, 343 F.2d 139 (1965). This was a case where the trial court refused to instruct on several matters brought out in Defendant's defense, thereby allowing the jury to convict even without proof of all the required elements of the offense or to convict without considering some of the defenses raised such as entrapment which, if true, would negate the requirement that conspiracies exist only where there are at least two persons with criminal intent. Very similar to *Madden*, *Sears* was a case where the State injected an issue into the case but the judge thereafter refused to instruct the jury on it. In *Sears*, it was entrapment; here, it was recklessness. The *Scars* court said it was fundamentally unfair to allow a case to go to a jury under such circumstances. The same principle should apply to this case!

CONCLUSION

Finally, the best argument for granting this Writ is to quote from *Paul* (at P. 501) as to why the 9th Circuit believed it had to reverse the jury verdict there: "...(W)e believe our failure to correct the error would 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' "

Respectfully Submitted,

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